In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 418

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama

PETITIONER

vs.

WILLIAM S. RICE,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

MacDONALD GALLION
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ATTORNEYS FOR PETITIONER
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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus, dated May 30, 1968, is reported as *Simpson v. Rice,* 396 F. 2d 499.

The opinion of the United States District Court for the Middle District of Alabama granting the respondent's motion to file in forma pauperis his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson,* 271 F. Supp. 267.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus, dated September 26, 1967 is reported as *Rice v. Simpson*, 274 F. Supp. 116.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 30, 1968. A petition for a writ of certiorari was filed on August 19, 1968, and was granted on November 12, 1968. The jurisdiction of this Honorable Court rests on Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

I

Whether a State court may increase punishment following a new trial on a plea of not guilty where the first sentence imposed on a plea of guilty is vacated on the prisoner's contention that he was denied counsel at the first trial.

II

Whether it was constitutionally permissible to deny to the respondent credit on subsequent valid sentences for time served on a prior void judgment.

STATEMENT

The respondent, William S. Rice, filed in forma pauperis his application for writ of habeas corpus in the United States District Court for the Middle District of Alabama. (R. p. 5.) He alleged that in the Circuit Court of Pike County, Alabama, in February 1962, upon pleas of guilty to four separate

indictments charging the offenses of burglary in the second degree, he was sentenced to a total of ten (10) years in the State penitentiary. He further alleged that in August, 1964, the judgments and sentences in these cases were set aside by said State court after a hearing upon his application for writ of error coram nobis. The basis for this action was that the respondent was not represented by counsel at the time he entered his pleas of guilty in 1962. The respondent also alleged that in December, 1964, he was retried in Case No. 6427, and in Case No. 6428, and was sentenced to a term of ten (10) years in each case. He also stated that in May, 1965, he was convicted in Case No. 6430, and sentenced to a term of five (5) years. Case No. 6429 was nol prossed on the motion of the State Solicitor in May, 1965.

In regard to Case No. 6429 the State Solicitor stated, (R. pp. 55 and 56) as follows:

> "I was informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina. Taking into consideration the distance involved, the other sentences and the fact that defendant had already served in prison between his original plea of guilty and his petition for writ of error coram nobis which had been granted, I moved the Court to nolle pros. Judge Eris F. Paul, the trial judge, concurred and the order was made. This motion was made by me with knowledge of the fact that the defendant had spent a vast majority of his adult life in prison, according to his FBI record."

The respondent contended that the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on one of his original sentences and that the sentences resulting in his present incarceration violated his constitutional rights in that said sentences constitute punishment for his having exercised his right and having been successful

in a State post-conviction proceeding. The respondent contended that it is not constitutionally permissible for the State of Alabama to deny him credit for time served on his void sentence, and that a State trial court may not constitutionally impose sentences greater than those imposed upon his first trial.

The United States District Court allowed the filing of the application for writ of habeas corpus and denied the petitioner's motion to dismiss. (R. p. 56.)

After a hearing on the merits of the case (R. pp. 79-143) said District Court held that the State of Alabama must give the respondent credit for the time he served upon the void sentence imposed in February, 1962, in Case No. 6427. Said Court also held that the maximum time which could constitutionally be imposed by the Circuit Court of Pike County, Alabama, upon the respondent was four (4) years in Case No. 6427, two (2) years in Case No. 6428, and two (2) years in Case No. 6430. The Court also ordered that under its calculation the excess time which had been served in Case No. 6427 to the date of the Court's order must be credited to Case No. 6428 and Case No. 6430. (R. pp. 57-73.)

The effect of the order of said District Court was that the respondent had finished serving his sentence in Case No. 6427 and that he must be given credit for excess time served, as such time was calculated by the Court, toward the sentences in Cases No. 6428 and 6430.

Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, took an appeal to the United States Court of Appeals for the Fifth Circuit (R. p. 74) and on May 30, 1968, said Circuit Court of Appeals affirmed the order and judgment of the United States District Court for the Middle District of Alabama. *Simpson v. Rice*, 396 F. 2d 499.

A petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed in this

Honorable Court on August 19, 1968, and the writ was granted on November 12, 1968.

ARGUMENT

I

The first and paramount question presented is whether, under the facts of the case at bar, a State trial court may constitutionally subject a person to a more severe punishment upon a second conviction under an indictment than was imposed upon him on his first conviction under such indictment. This question should be answered in the affirmative.

The majority of the courts which have been faced with the question have held or indicated that it is permissible to impose upon a defendant convicted at a new trial of the same crime of which he was previously convicted a more severe punishment than was imposed upon his earlier conviction. This seems to be the better rule from the standpoint of both society and the accused in the administration of criminal justice.

In the case of *United States v. Russell*, 378 F. 2d 808 (3rd Cir. 1967) the Court considered an appeal from a habeas corpus proceeding, the facts of which are strikingly similar to the case at bar. It was there held that imposing a greater sentence on fewer counts after a new trial of the case before a jury than was given the petitioner on his plea of guilty at his first trial did not violate constitutional standards of due process. The Court said, in part, as follows:

> "While we are wholeheartedly in agreement with the principles laid down in Gideon v. Wainwright, * * *, it must be conceded that only the fact of not being represented by counsel in the pre-court proceedings gave him the second opportunity to plead his case and he chose to go to trial and have a jury test the accusations against him. When he appeared and entered a

plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

In the case of *United States v. White*, 382 F. 2d 445 (7th Cir. 1967), the Court held that different punishments may be imposed upon reconviction of the same crime following a successful appeal when the punishment results from the judge's exercise of his judicial discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

The following cases support, either expressly or by implication the view that a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed should he again be convicted of the same crime under the same indictment:

ROBINSON V. UNITED STATES,
144 F. 2d 392 (6th Cir.)
Cert. Den. 324 U. S. 282,
89 L. Ed. 629, 65 S. Ct. 666;

HOBBS V. STATE,
231 Md. 533, 191 A. 2d 238,
Cert. Den. 375 U. S. 914,
11 L. Ed. 2d 153, 84 S. Ct. 212;

HICKS V. COMMONWEALTH,
345 Mass. 89, 195 N. E. 2d 739,
Cert. Den. 374 U. S. 839,
10 L. Ed. 2d 1060, 83 S. Ct. 1891;

STATE V. WHITE,
262 N. C. 52, 136 S. E. 2d 205,
Cert. Den. 379 U. S. 1005,
13 L. Ed. 2d 707, 85 S. Ct. 726;

STATE V. KNEESKERN,
203 Iowa 929, 210 N. W. 465;

STATE V. MORGAN,
145 La. 585, 82 So. 711;

SANDERS V. STATE,
239 Miss. 874, 125 So. 2d 923;

COMMONWEALTH EX REL. WALLACE V. BURKE,
169 Pa. Super. 633, 84 A 2d 254;

STATE V. SQUIRES,
(1966, S. C.) 149 S. E. 2d 601.

This Honorable Court held in *Stroud v. United States*, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50, that a prisoner's constituional rights were not violated when he was convicted of first degree murder with the death penalty after reversal of a first conviction of the same degree but with a life sentence. This is the only case in which this Honorable Court has heretofore written to the question involved.

Sentences totaling five years more of imprisonment than were imposed upon the first trial for armed robbery were affirmed in *Hobbs v. State*, supra. The Court in this case rejected the contention that the imposition of new sentences in the second trial, resulting in a greater period of confinement, were unlawful. The Court declared that ordinarily any punishment authorized by statute and within the statutory limits was not cruel and unusual, and held that in asking for and receiving a new trial a defendant must accept the hazards as well as the benefits resulting therefrom.

The imposition of a 12 year sentence on a third conviction for manslaughter was affirmed in *Sanders v. State*, supra, where in the first trial the defendant had been sentenced to serve a term of ten years. Pointing out that in

that case the first judgment was reversed at the defendant's instance, the Court declared that it could not say that the trial judge on the present trial was in error in pronouncing a sentence of 12 years.

For the sake of brevity we will not discuss in detail each of the cases listed hereinabove. Suffice it to say that each Court rejected any contention that the State was limited as to the term of the sentence pronounced upon the accused by the punishment imposed upon his first trial.

Courts have recognized that pleas of guilty are the result of a bargain or agreement with the prosecutor and that a guilty defendant must always weigh the possibility of receiving a more severe sentence on a plea of not guilty than he will receive as a result of an agreement with the prosecutor for a lighter sentence. *Cooper v. Holman*, 356 F. 2d 82 (5th Cir.), and *Cortez v. United States*, 387 F. 2d 699 (9th Cir.).

In Alabama maximum sentences which may be imposed upon persons convicted of crime are fixed by statutes. The effect of the judgment of the court below in the case at bar is to reduce this statutory maximum as to the respondent. If said judgment is allowed to stand the trial courts of the State of Alabama will not be allowed to impose maximum sentences upon convictions after pleas of not guilty in cases in which the accused has been previously sentenced to short terms upon pleas of guilty.

The judgment below approves the finding of the District Court that no justification is shown in the case at bar for more severe punishment after reconviction. It is respectfully submitted that the petitioner should not have been required to show any fact other than the fact that the first conviction was on a plea of guilty and the second conviction was imposed only after a trial on a plea of not guilty. One accused of crime is in many instances given a lighter sentence when he enters a plea of guilty than when he is convicted

after insisting that he is not guilty. It is our contention that this is a healthy situation from the standpoint of the accused as well as from the standpoint of society. See *United States v. Russell*, supra.

This Honorable Court has never held that a more severe punishment on a second trial is unconstitutional. The better and more just reasoning is found in those cases which hold that a new trial bears no relationship to a previous plea of guilty and begins with the slate wiped clean.

II

The second question presented by the case at bar concerns the right of a State convict to credit for time served under a void judgment of conviction necessitating a new trial.

The position of the State of Alabama in regard to this question is reflected by the opinion of the Alabama Court of Appeals dated November 28, 1967, in the case of *Goolsby v. State*, 6th Div. 202, and the case of *Ex Parte State of Alabama ex rel Attorney General*, 6th Div. 543. The latter case was decided by the Supreme Court of Alabama on October 3, 1968, and modified the opinion expressed in the *Goolsby* Case. Both of these opinions are unreported to date. The opinion of the Alabama Court of Appeals is printed in Appendix A, hereto, infra, and the opinion of the Supreme Court of Alabama is printed in Appendix B, hereto, infra.

The opinion of the court below (R. p. 150) which adopts the opinion of the District Court for the Middle District of Alabama (R. p. 57) held that it is not constitutionally permissible for the State of Alabama to deny to the respondent credit for time served on a void judgment to be applied to sentences imposed by subsequent valid judgments. Said opinion of the court below is in direct conflict with the case of *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967). See also *State v. King*, 180 Neb. 631, 144 N. W. 2d 438; *State*

ex rel Ivey vs. Meadows, (Tenn.) 393 S.W. 2d 744; and *Wolford v. Warden,* 215 Md. 640, 137 A. 2d 646.

Subsequent to the date of the decision in *Hill v. Holman,* 255 F. Supp. 924, a State prisoner in Alabama has been given credit for time served on a void sentence when there is another valid sentence pending against him during the period such time is served. See also *Youst v. United States,* 151 F. 2d 666 (5th Cir. 1945).

Neither *Hill v. Holman,* supra, nor *Youst v. United States,* supra, should control the case at bar.

In the case of *Hill v. Holman,* supra, which was decided by the same United States District Court before which the case at bar was originated, a writ of habeas corpus was granted and a State prisoner was held entitled to his immediate release. The opinion of said District Court in that case was very broad and the dictum found therein would control the case at bar if the facts of the two cases were identical. However, such facts were not identical since the prisoner involved in the case of *Hill v. Holman,* supra, had actually served the time imposed upon him under all his valid sentences at the time of his release.

The case of *Youst v. United States,* supra, does not control the case at bar since the opinion in that case applied credit for time served under a void judgment to a valid sentence which existed during the period such time was served.

The case of *Hill v. Holman,* supra, cites *Hoffman v. United States,* 244 F. 2d 378 (9th Cir. 1957). The *Hoffman* case recognizes the principle that time served should be applied to existing valid sentences, however, the prisoner in said case was not released because he had not been incarcerated for a time equal to his sentences under admittedly valid judgments.

As pointed out hereinabove the judgment of the court below is in direct conflict with the case of *Newman v. Rodriguez*, supra, which held that the denial to a State prisoner of credit for time served on a void judgment was constitutionally permissible. The facts of that case are similar to the facts in the case at bar. In the case at bar as well as in the *Newman* Case there was no valid judgment pending against the prisoner at the time his conviction was declared to be void. Cf. *Meyers v. Hunter*, 160 F. 2d 344 (8th Cir. 1947); Cert. Den. 331 U. S. 852, 91 L. Ed. 1860, 67 S. Ct. 1730.

In footnote 6 to the order of the District Court in the case at bar (R. p. 72), the Court recognizes that its holding is in conflict with the opinion rendered in the case of *Newman v. Rodriguez*, supra.

In Alabama the maximum sentence which may be imposed upon an accused found guilty of the offense of burglary in the second degree is ten (10) years in each case. Under the order of the District Court in this case, as of August 31, 1967, the respondent had served four (4) years, five (5) months and eight (8) days in the penitentiary. (R. p. 72) Two (2) years, eight (8) months and twenty-two (22) days of this time had been served on his valid judgment in Case Number 6427.

Since the valid sentences imposed upon the respondent total twenty-five (25) years, it becomes apparent that the State of Alabama has not ordered this convict to serve sentences totaling more than the maximum time allowed by statute. See *Ex Parte State of Alabama ex rel Attorney General*, supra.

Therefore, the State of Alabama has not violated any constitutional right of the respondent by denying to him credit for the two (2) years, six (6) months and twelve (12) days served by him on his void sentence in Case Number 6427. Cf. *Newman v. Rodriguez*, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama

Counsel For Petitioner

CERTIFICATE

I, Paul T. Gish, Jr., one of the Attorneys for the petitioner and a Member of the Bar of the Supreme Court of the United States hereby certify that, in accordance with the instructions by letter dated November 13, 1968, received from the Clerk of this Honorable Court, on the 10th day of December, 1968, I served a typewritten copy of the foregoing brief on the attorney of record for the respondent, by mailing such typewritten copy in a duly addressed envelope with first class postage prepaid addressed as follows:

To: Honorable Oakley W. Melton, Jr.
Attorney at Law
339 Washington Avenue
Montgomery, Alabama 36104

I further certify that on the date said brief was received from the printer I served two copies of same upon said attorney in the manner set forth hereinabove.

PAUL T. GISH, JR.
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of Alabama

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APPENDIX "A"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1967-68

6 Div. 202

James Goolsby, alias

v.

State

Appeal from Jefferson Circuit Court

CATES, JUDGE

The facts in this case show that appellant, Goolsby, was indicted by the Grand Jury in July, 1959, on three counts: Count One, burglary; Count Two, grand larceny; and Count Three, buying, receiving and concealing stolen property. Goolsby, without counsel, entered a plea of guilty and was sentenced to serve ten years in the State penitentiary.

September 7, 1965, the judgment was set aside and appellant was granted a new trial. At the second trial, Goolsby filed three pleas of autrefois acquit, which were overruled.

The Attorney General, in brief, gives the following statement of facts:

> "The evidence introduced by the State tended to show that the appellant and one Henry Lee Lucas broke a window at the Truck & Auto Rental Company, in Birmingham, Alabama, on September 22, 1959. Upon entering the building through this window they carried a safe from the building through a door which they forced open and loaded the safe on a pick-up truck. This occurred during the early hours of the night. They

hauled the safe to a wooded area located near the reservoir of the Birmingham Water Works and unloaded it.

"The next day the appellant and Lucas opened the safe and took from it certain money and a number of checks.

"After the appellant was arrested Lucas gave himself up to the law enforcement officers and made a statement confessing the crime and implicating the appellant. This statement was introduced into evidence.

"The appellant testified that he did not commit the crime and was not with Lucas on the night of September 22, 1959. He stated that Lucas implicated him in the crime because of a prior difficulty between the two men."

I.

Nowhere in the record before us appears a judgment on Goolsby's plea of guilty at his first arraignment. His brief states that he pleaded guilty to Count One, second degree burglary. Even if this were so, standing alone it would not necessarily acquit him of larceny charged in a separate count. *Bowen*, 106 Ala. 178, 17 So. 335. *Wildman*, 42 Ala. App. 357, 165 So. 2d 396, is concerned with punishment under Code 1940, T. 15, § 387.

When a defendant appeals from a judgment of conviction, he implicitly agrees in case of reversal to return to the stage of proceedings at which the reversible error occurred. A trial, after issue is joined, is of necessity treated as an indivisible unit.

Hence, for error during trial the former jurors are not called back and testimony begun anew, rather we have a new writ, venire facias de novo or a new trial. *Sewall v. Glidden*, 1 Ala. 52; *Grossman v. S.*, 241 Ind. 369, 172 N. E. 2d 576.

Under *Gideon v. Wainwright*, 372 U. S. 335, Goolsby's first trial after the coram nobis judgment was a nullity because the court lacked one of its indispensable officers, an attorney for the defendant. We know that Gideon was retried—and acquitted.

If Goolsby's first arraignment was void, so too was any nol prosse consequent thereon. Hence, on the second trial the cause would revert de novo to arraignment because this was the severable point in the proceeding at which the former error infected judgment.

In *United States v. Tatoo*, 377 U. S. 463, we find:

"The Fifth Amendment provides that no 'person [shall] be subject for the same offence to be twice put in jeopardy of life or limb . . . .' The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence. In this respect we differ from the practice obtaining in England. The rule in this country was explicitly stated in *United States v. Ball*, 163 U. S. 662, 671-672, a case in which defendants were reindicted after this Court had found the original indictment to be defective. It has been followed in a variety of circumstances; see, e. g., *Stroud v. United States*, 251 U. S. 15 (after conviction reversed because of confession of error); *Bryan v. United States*, 338 U. S. 552 (after conviction reversed because of insufficient evidence); *Forman v. United States*, 361 U. S. 416 (after original conviction reversed for error in instructions to the jury).

"That a defendant's conviction is overturned on collateral rather than direct attack is irrevelant for these purposes, see *Robinson v. United States*, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U. S. 282. Courts are empowered to grant new trials under 28 U. S. C. § 2255,

> and it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review.

See also Anno. 75 A. L. R. 2d 683, particularly § 7, p. 700, et seq.

We see no application here of any potential pleas of former jeopardy even if the appellant were to have properly proved a former judgment of conviction of second degree burglary; and, with an implicit acquittal of grand larceny and receiving stolen goods, *Bell*, 48 Ala. 684, would not apply here. *Brooks*, 42 Ala. App. 69, 152 So. 2d 441, does.

II.

The trial before the jury occurred January 12 and 13, 1966. *Miranda v. Arizona*, 384 U. S. 436, applies to trials after June 13, 1966, as required by *Johnson v. New Jersey*, 384 U. S. 719. See *Mathis*, 280 Ala. 16, 189 So. 2d 564, where we find:

> "There is nothing in the record indicating that Mathis, when he made the statements, either had a lawyer who was not permitted to be present, or requested a lawyer, or requested to see anyone."

Hence, Goolsby's pre-*Miranda* confession was admissible under the then extant Alabama practice. The fact that during in-custody interrogation the police did not advise Goolsby of having counsel or of being silent, was only a part of the totality. *Escobedo v. Illinois*, 378 U. S. 478, has been sufficiently discussed in *Duncan*, 278 Ala. 145, 176 So. 2d 840, *Sanders*, 278 Ala. 453, 179 So. 2d 35; *Lokos*, 278 Ala. 586, 179 So. 2d 714; *Mathis*, supra; *Harris*, 280 Ala. 468, 195 So. 2d 521; and *Clark*, 280 Ala. 493, 195 So. 2d 786.

III.

Appellate counsel, extending their claim of double jeopardy, argue also that it was error for the trial judge to

charge as to the elements of grand larceny and receiving, i. e., Counts Two and Three of the indictment.

No objection was made to the oral charge; the verdict was for Count One (second degree burglary). Hence, there is no error. Code 1940, T. 7, § 273.

IV.

Aaron, 43 Ala. App. 450, 192 So. 2d 456, was an appeal from denial of habeas corpus. There Aaron tried to contest a second sentence of five years.

The crime carried a possible maximum of twenty years. Two reasons were advanced to affirm: first, inadequate remedy, *Rice v. Simpson*, 271 F. Supp. 267; and, second, the time served plus the new time did not exceed twenty years. This latter was used to refute a claim of excess of jurisdiction as a basis for habeas corpus relief. *City of Birmingham v. Perry*, 41 Ala. App. 173, 125 So. 2d 279.

The instant record, however, presents a direct appeal wherein our review is channeled by Code 1940, T. 15, § 389, which reads:

> "§ 389.—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant."

We find nothing to indicate that on allocutus the trial judge here made any enquiry as to the time served on the former conviction. As under *Bryant*, 42 Ala. App. 219, 159

So. 2d 627, failure to go into prior time shown by the official records of the Board of Corrections, we consider to be error requiring not reversal but remandment.

Harsher sentences consequent upon new trials have been viewed by some courts as clogs on the constitutional right of post conviction review. The problem is far from uniformly resolved. See *State v. Turner*, ___ Ore. ___, 429 P. 2d 565; *State v. Wolf*, 46 N. J. 301, 216 A. 2d 586, 12 A. L. R. 2d 970; *Holland v. Boles*, 269 F. Supp. 221; *Patton v. North Carolina*, 256 F. Supp. 225; *United States v. Russell*, 378 F. 2d 808. See Anno. 12 A. L. R. 3d 978.

In fixing any sentence, we think that a trial court should be given latitude. For example, the evidence brought out on a full trial, such as was had here, may exhibit heinousness (or conversely factors of mitigation) not shown on a bare plea of guilty and a presentence investigation.

Certainly the sentencing authority can and should consider at least:

a) The circumstances of the crime;

b) The maximum and minimum punishment fixed by the Legislature;

c) The prospects of reformation;

d) Deterrence;

e) Other sentences in other cases;

f) Time served on a former conviction for the identical crime, including credit, if any, for good behavior; and

g) The condition of the defendant.

It would be mechanistic jurisprudence arbitrarily to require that the second sentence subtract prior time or that the former sentence be a Plimsoll loadline. There should be

flexibility so that the second sentence should be based on considerations which seem best for society and the defendant at that time.

The judgment below is due to be affirmed as to conviction but the cause is remanded for resentencing in accordance with the foregoing.

AFFIRMED BUT REMANDED FOR RESENTENCING.

After Remandment

CATES, J.

After our Supreme Court adopted the opinion of Judge Simmons, that court in its formal order October 3, 1968, ordered "that the opinion rendered by the Court of Appeals on November 28, 1967, be and is hereby modified so as to conform with the opinion rendered by the Court in this cause on this day."

Further, the Supreme Court went on to affirm the judgment of this Court.

Accordingly, this extension of opinion is entered to memorialize said modification. The cause is remanded to the Circuit Court for proper sentencing.

APPENDIX "B"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1968

Ex parte State of Alabama, ex rel. Attorney General
(In re: James Goolsby, Alias

6 Div. 543

v.

State of Alabama)

Petition for Writ of Certiorari to the Court of Appeals

PER CURIAM.

Pursuant to petition here filed by the State of Alabama, this court granted a writ of certiorari directed to the Court of Appeals to send up its record in the foregoing cause for review and consideration by this court.

Petitioner asserts that the Court of Appeals "erred in holding that the record on appeal must show that the trial judge considered time served in prison by the appellant on a void judgment when sentencing said appellant after conviction on a new trial."

We agree with the Court of Appeals that the trial judge committed error requiring remand but not reversal, on allocutus, to inquire as to the time defendant had served, including credit for good behavior, on a former conviction for the identical offense. This inquiry was pertinent in this particular case, but not necessarily mandatory in all cases.

In the instant case, the defendant was indicted in July, 1959. The indictment contained a count for burglary in the second degree, to which the defendant pled guilty, and was sentenced to the maximum of ten years imprisonment in the penitentiary. He was not represented by a lawyer when he

entered this plea. This conviction was subsequently vacated on the petitioner's petition and a new trial was ordered. He was convicted by a jury on a plea of not guilty and again sentenced by the trial judge to ten years imprisonment for the identical offense.

We think that the trial court, on allocutus after conviction the second time, should have made inquiry as to the length of imprisonment, with credit for good behavior, that the defendant had served on the first conviction and sentence, and should have credited the time so served on the proposed ten year sentence. Without such credit defendant would be serving time beyond the maximum fixed by law for the offense of burglary as charged in the indictment.

Such excessive punishment would be in violation of the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are now applicable to the several states.

When the defendant is resentenced, the total sentence in point of time, when added to the time already served including credit for good behavior, should not exceed the maximum of ten years. It may be less, within the discretion of the trial court, but not in excess.

We pretermit consideration of the validity vel non of a longer or harsher sentence following a second judgment of conviction than was pronounced on the first judgment of conviction which was invalid. The question of harsher punishment (within lawful limits) on the second conviction than was imposed on the first is not here involved. We have here an excess imprisonment above the maximum.

We are not in accord with the statement in the opinion that the sentencing authority should consider at least certain factors (A to G, inclusive) which are set forth in the opinion. These guidelines might be helpful suggestions to the trial judge in reaching a conclusion as to proper and reasonable

punishment to be imposed on a defendant who has been convicted of a felony, but we do not think the trial judge should be mandatorily fettered by these considerations. The record need not affirmatively show such considerations.

The trial court, in certain offenses, has the prerogative to assess punishment within the legal limits, as sound discretion should dictate. *Yates v. State*, 31 Ala. App. 362, 17 So. 2d 776, cert. den. 245 Ala. 490, 17 So. 2d 777; 7 Ala. Digest, Criminal Law, § 1208(2).

Our appellate court should not usurp or invade the discretionary authority of the trial court in fixing punishment, within lawful limits, by the establishment of mandatory guidelines which the Court of Appeals set out with direction they should be considered.

The opinion of the Court of Appeals is modified. Its judgment affirming the judgment of guilt entered by the trial court and remanding the cause for proper sentence (in conformity with this opinion) is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

MODIFIED AND AFFIRMED.

Livingston, C. J. and Simpson, Coleman and Kohn, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 3rd day of October, 1968.

J. O. SENTELL
Clerk Supreme Court of Alabama